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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. ~~1056~~ 102

Phillips Petroleum Company, a corporation,
Petitioner,

versus

Mayoe Porter Buster and The Hitch Land and Cattle Company, a corporation, Harry M. Hitch and Bill Logsdon,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the
Supreme Court of the United States
OCTOBER TERM, 1956

No. 1056

PHILLIPS PETROLEUM COMPANY, a corporation,
Petitioner,

VERSUS

MAYOE PORTER BUSTER and THE HITCH LAND AND CATTLE COMPANY, a corporation, HARRY M. HITCH and BILL LOGSDON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 23-35) is reported at 133 F. Supp. 594. The opinion of the Court of Appeals and the concurring opinion are reported at 241 F.2d 178.

JURISDICTION

The jurisdictional requisites are adequately stated in the petition.

QUESTIONS PRESENTED

1. Whether, under Oklahoma law, equitable relief is proper against threatened disconnection of natural gas to pump deep irrigation water wells on the facts concurred in by both lower courts, where petitioner represented and agreed that gas from its gas wells on land owned or farmed by respondents would be provided by sale to pump irrigation water wells on such land, and where respondents in reliance thereon known to petitioner, spent substantial sums and commenced such irrigation operations.

2. Whether decrees enjoining petitioner from disconnecting gas lines to specified irrigation wells, and from refusing to permit the use and purchase of such gas reasonably necessary for irrigation on described land from specified gas wells thereon at a reasonable price, are sufficiently specific in terms and reasonable in detail to comply with Rule 65, Federal Rules of Civil Procedure.

STATEMENT

Respondents brought two suits in the Oklahoma courts to enjoin petitioner from disconnecting natural gas used to pump deep water wells irrigating lands owned or farmed by them. On diversity grounds, petitioner removed the cases to the District Court, which granted injunctive relief after a consolidated trial. The Court of Appeals reviewed portions of the findings which were questioned, and affirmed under Oklahoma law.

Both lower courts considered two additional cases in the consolidated trial and appeal, but review is not sought of the judgments in those cases which reversed injunc-

tions granted by the District Court, and no further reference to them is made.

The petition here seeks review of the two judgments of the Court of Appeals sustaining equitable relief in cases there styled *Phillips Petroleum Company* v. *Mayoe Porter Buster* (hereinafter the *Buster* case), and *Phillips Petroleum Company* v. *The Hitch Land and Cattle Company, Harry M. Hitch, and Bill Logsdon* (hereinafter the *Hitch Land Company* case).

The facts in which both lower courts concurred follow. Petitioner has producing gas wells, under oil and gas lease rights, on each of the two sections of farm land in Texas County, Oklahoma, involved. Respondents own separate tracts in these sections, except respondent Logsdon, who farms one tract as a tenant (R. 36, 246). In recent years severe drouth plaguing this vicinity of the Oklahoma Panhandle has made irrigation necessary for continued agricultural use of the land with reasonable assurance of profit. Deep water wells with about 380 and 390 foot depths are the source of water for irrigation. The gas produced from under the land has served as the only fuel whose reasonable cost permits pumping, with reasonable assurance of profit, to raise water for irrigation from these deep wells, since the cost of other fuels greatly exceeds that of the indigenous gas (R. 38, 248-249).

Under such circumstances, it became the general custom and policy before 1953 in this vicinity for gas producing companies, including petitioner, to permit the purchase of gas from their gas wells to operate these deep water wells (R. 39, 249). In about January of 1953, representa-

tives for respondents in the *Hitch Land Company* case contacted petitioner's field superintendent, Dale Lewis, about buying gas from the gas well on their land for a projected irrigation well. Lewis represented and agreed that if respondents drilled and equipped their irrigation well, petitioner would provide gas needed for its pumping—arrangements which Lewis's authority and apparent authority included (R. 246-247).

These respondents in the *Hitch Land Company* case then drilled and equipped their irrigation well to about a 360-foot depth for about $14,000.00 and invested about $15,000.00 more in preparation of the land and purchase of equipment—all with petitioner's knowledge of such reliance on availability of its gas. Petitioner's agents and employees made the connection for its gas line with respondents' line to receive the gas, and its use for irrigation after about April 9, 1953, was known to petitioner (R. 247-248). Less than 2% of this gas well's 1953 production of 92,000,000 cubic feet was used in the irrigation operations (R. 249).

Similar findings generally were made in the *Buster* case, with these variations. Respondents there contacted petitioner's field superintendent Lewis in about December, 1952, concerning gas for an irrigation well which they were drilling. Lewis represented and agreed that if they completed the drilling and equipping of their well, petitioner would provide gas reasonably needed for its pumping. Of $17,000.00 invested, more than $10,000.00 for completing and equipping the well at about a 390-foot depth was spent after Lewis's representations, and in reliance on them known to petitioner (R. 37-38). Petitioner's agents

and employees installed the valve for the connection with respondents' line, and their use of the gas for irrigation after about January 15, 1953, was known to petitioner. Here also less than 2% of the gas was used for irrigation, from a well whose production was about 106,000,000 cubic feet in 1953 (R. 38-39).

On about July 23, 1953, petitioner wrote respondents in both of the instant cases that unless the gas connections for their irrigation wells were removed by them before September 1, 1953, petitioner would disconnect the lines itself. Petitioner maintained this position threatening disconnection until trial (R. 39, 249-250), and appears to assert this same right to the present.

These findings were made by the District Court largely on oral testimony, some of which presented sharp conflicts. The trial judge held that respondents were entitled to relief under principles of estoppel by Oklahoma law, being threatened with irreparable injury. The portions of the findings questioned were sustained by the Court of Appeals, and it affirmed on the same ground. One member of the Court in a concurring opinion indicated that the record would support a finding and relief limited in time, which he would prefer.

ARGUMENT

The judgments below are correct. While the cases turn on unique facts, under the findings concurred in by both lower courts, the law of Oklahoma clearly entitles respondents to equitable relief.

All the technical objections argued by petitioner as Reasons I, II, and III for granting the writ overlook the equitable ground for relief based on estoppel where respondents made substantial investments in reliance on petitioner's representations, with its knowledge. Petitioner's claim of indefiniteness in its representations ignores the substance of the findings. The lower courts correctly rejected this objection under the Oklahoma rule strongly disfavoring destruction of obligations for indefiniteness, especially where reliance has been placed on them. The argument that specific performance was granted without mutuality of obligation and remedy mistakes the nature of the relief. Furthermore, even if such an objection is relevant, respondents' performance and circumstances which insure that they must use such gas, dispose of the point.

Reason IV, relating to compliance with Rule 65 in the specificity of the injunctions, is untenable. The decrees are sufficiently specific and describe the acts sought to be restrained in reasonable detail. The point involves no conflict of decision or important federal question.

These diversity cases were properly decided under state law by courts of special competence in its application. Asserted conflicts with the law of other jurisdictions furnish no basis for review. No reason for granting the writ as stated by Rule 19 of this Court is present, and no other ground for review is involved. Hence, this plainly equitable determination of private rights, under unusual circumstances and local law, provides no occasion for granting the writ.

1. The decision below is correct under Oklahoma law and involves no question appropriate for review. These

cases reaching it solely on diversity, the Court of Appeals properly turned to the law of Oklahoma. 28 U.S.C. 1652; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64. It clearly stated the basis for its decisio under the state law as follows:

> "* * * But these were not actions for specific performance of the oral agreements. They were actions to enjoin threatened refusal to discharge an obligation resting upon Phillips to furnish gas, and the basis of the asserted relief was equitable estoppel. The oral agreements for the furnishing of gas for the operation of the water wells having been entered into with the mutual intent and purpose that plaintiffs would act in reliance thereon, plaintiffs having acted in such reliance by making substantial expenditures in the drilling or the completing of the drilling of the wells and in preparing the land for irrigation, and plaintiffs being in reasonably certain danger of suffering irreparable injuries for which there would be no adequate remedy at law if the furnishing of gas were discontinued, equity finds support in the law of Oklahoma for intervening and restraining the threatened discontinuance of the furnishing of gas. *Lacy* v. *Wozencraft*, 188 Okl. 19, 105 P.2d 781; *Holland* v. *Ross*, 189 Okl. 428, 117 P.2d 798." (Pet. App. A VII-VIII; 241 F.2d 178, 184)

These facts as summarized by the opinion stand as the concurrent findings of both lower courts, which are rarely reexamined here. *Allen* v. *Trust Co.*, 326 U.S. 630; *United States* v. *O'Donnell*, 303 U.S. 501; *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515; *Page* v. *Arkansas Natural Gas Corp.*, 286 U.S. 269. They clearly bring the instant cases within the principle in *Lacy* v. *Wozencraft*, 188 Okla. 19, 105 P.2d 781, and Oklahoma law generally.

In the *Lacy* case, the Oklahoma Court recognized estoppel as a proper defense in a forcible entry and detainer action. The Court pointed to proof that plaintiff had orally promised defendant to execute a three-year lease extending a tenancy; that plaintiff intended that the promise be acted upon; that the promise was acted upon by defendant, to her detriment, without protest or warning by plaintiff (which included several thousand dollars of investment in merchandise and remodeling); and that such circumstances brought the case within estoppel principles. *Strahm* v. *Board of Trustees of the Benevolent & Protective Order, etc.*, 203 Okla. 635, 636, 225 P.2d 159, 161. (dictum)

Each of these elements stands out in the instant cases. The court below reasoned carefully from them to a just result. Its opinion applied an even-handed justice, and the effort to disturb it is not appealing.

2. We turn now to petitioner's technical objections, urged in its four reasons for granting the writ. These began to emerge after petitioner decided to cut loose from its informal course of dealing and to stand on ceremony.

(a). Reason I for granting the writ argues that the Court of Appeals erroneously held that a unilateral promise may be enforced as a continuing contract of sale when term, price and quantity are unspecified.

Such an interpretation of the opinion is unwarranted. First, the argument overlooks the nature of the instant cases, which are grounded upon estoppel after performance in reliance upon petitioner's representations. Where performance has occurred, the objection that an obligation is uncertain comes too late and its destruction on this ground

is strongly disfavored. *Webb* v. *Moran*, 186 Okla. 140, 96 P.2d 308; *Oklahoma Portland Cement Co.* v. *Pollock*, 181 Okla. 266, 73 P.2d 427; *Harlow Publishing Co.* v. *Patrick*, 181 Okla. 83, 72 P.2d 511. Moreover, in conformity with the state practice, inferences reasonable under the circumstances were made as to the source, quantity, term and price of the gas. The men involved were acting informally and speedily, and directing their attention to the guaranty of gas, leaving out of account details which common sense supplied. Judicial responsiveness to the practical realities led to common sense inferences and findings. These are ignored by petitioner's argument. The contention lacks substance.

The Oklahoma authorities on the point cited at pages 17 and 18 of the petition may be put aside. In contrast to them, the instant cases present this background appropriate for inferences made as to the substance of the representations made and relied upon. Where the substance of such an obligation to supply gas is clear, injunctive relief is granted. See *Zenia Real-Estate Co.* v. *Macy*, 147 Ind. 568, 47 N.E. 147. The courts below were correct in making the inferences and rejecting the claim of indefiniteness.

(b). In Reason II for granting the writ, petitioner reads the opinion below as a novel, erroneous and far-reaching extension of promissory estoppel. Nothing new is presented in authority or in argument which mainly goes over the same ground—that petitioner's representations were uncertain.

It is urged that Lewis did not intend for petitioner to be bound. The argument looks at the wrong man. It is what

respondents were led to believe and do, not what Lewis may have intended, that matters. The findings pointing to reliance by respondents on Lewis's representations with petitioner's knowledge focus properly.

Petitioner's alarm over the scope of the opinion is unconvincing. It decides the instant cases against a background of unique circumstances. It reaches no farther than the area clearly staked out by Oklahoma decisions. And indeed, a contrary result would not fit into the equitable pattern of the state law.

(c). In Reason III for granting the writ, petitioner contends that the Court of Appeals erroneously held that the instant cases were not actions for specific performance, and improperly disregarded the requisites of mutuality of remedy and obligation.

The Court of Appeals correctly pointed out that these were not actions for specific performance of wholly executory obligations and that respondents had given performance (Pet. App. A VII-VIII, 241 F.2d 178, 184). The findings are that irrigation being vital to respondents, they invested about $25,000.00 in the *Hitch Land Company* case and about $17,000.00 in the *Buster* case in drilling wells and preparations; that petitioner's gas is the only fuel whose cost permits irrigation with reasonable assurance of profit; and that its use was begun and continued for several months before petitioner changed its ground (R. 37-38, 247-248). Respondents have performed. They have gone beyond the point of no return.

Petitioner relies on two Oklahoma cases in support of this portion of its argument, *Kolachny* v. *Galbreath*, 26

Okla. 772, 110 Pac. 902; *Warner* v. *Page*, 59 Okla. 259, 159 Pac. 264. In both suits to assert rights under oil and gas leases, at the time of suit plaintiff had not performed drilling operations and had the right to elect not to do so. Relief was denied for lack of mutuality of remedy. In both, the syllabi of the opinions clearly indicate that if plaintiffs had performed or placed themselves in a position where they might be compelled to perform, the result would have been different. And in *Pucini* v. *Bumgarner*, 71 Okla. 105, 175 Pac. 537, relief was granted against interference with rights under the lease, where by agreement the filing of suit itself removed plaintiff's option not to perform. *Cf. McCullough* v. *Smith*, 243 Fed. 823, 834-835 (8th Cir.) A fortiori, where respondents here have drilled their wells and commenced use of gas, the objection on mutuality of remedy is out of place.

Even where specific performance is sought, the concern of the chancellor on mutuality of remedy is for reasonable assurance that the person seeking relief will perform himself. The Court may be satisfied as here that the plaintiff's strong economic interest in going forward, after substantial investment, guarantees his performance. *Plastray Corporation* v. *Cole*, 324 Mich. 433, 443-444, 37 N.W.2d 162, 166; *Temple Enterprises, Inc.* v. *Combs*, 164 Ore. 133, 155, 100 P.2d 613, 621-622 (dictum); Restatement, Contracts, § 375, comment *b*, 684 (1932); 5 Williston, Contracts, § 1440, 4022-4023 (rev. ed. 1936). Moreover, where defendant's continued performance is conditioned on plaintiff's going forward, the built-in guaranty suffices. *Great Lakes & St. Lawrence Transportation Co.* v. *Scranton Coal Co.*, 239 Fed. 603, 609 (7th Cir.); *Elk Refining Coal Co.* v. *Falling Rock*

Cannel Coal Co., 92 W. Va. 479, 486, 115 S.E. 431, 434. The earnest of respondents' performance is ample.

As to mutuality of obligation, on this score the court is simply determining whether there is sufficient consideration to support petitioner's obligation. *Adalex Laboratories* v. *Krawitz*, 270 P.2d 346, 349-350 (Okla., 1954); 1 Williston, Contracts, § 141, 504-505 (rev. ed. 1936). Such consideration is found in respondents' reliance and detriment in drilling their wells and preparing for irrigation. 15 O.S. 1951, § 106; *Clemons* v. *Hampton*, 191 Okla. 693, 132 P.2d 919. And such independent consideration would support petitioner's obligation to furnish gas, even if respondents had an option to abandon its use. *Adalex Laboratories* v. *Krawitz*, *supra*.

(d). In Reason IV for granting the writ the injunctions are questioned, petitioner urging that they are not specific in terms as required by Rule 65, Federal Rules of Civil Procedure.

Rule 65(d) provides in pertinent part;

> "(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; * * *."

The injunctions entered by the District Court in the instant cases are identical, with the exception of variations in describing the gas line, water well, gas well and

irrigated land involved in each (R. 41-42, 252). Both decrees restrained petitioner, its officers, agents, servants and employees from disconnecting respondents' gas line connecting their water well, irrigating the described tract in the described sections, with petitioner's named producing gas well on the tract. Both decrees further restrained the same parties

> "from refusing or failing to permit the use and purchase by plaintiffs at a reasonable price, during the continuance of such irrigation, from gas produced on said land of such amount of natural gas as is reasonably necessary for such irrigation on said land." (R. 42, 252).

Petitioner argues in general terms concerning vagueness of the injunction, referring specifically only to the statement on price. The decrees are specific in terms and framed in reasonable detail. Specific water wells, gas lines, gas wells and tracts of irrigated land are identified. As to the term on reasonable price, such provision defining the legal consequence of the use of gas is proper and the guide of reasonable price is sufficient, correctly not foreclosing practicable adjustment on this supplemental matter by the parties or an exercise of the court's continuing jurisdiction. *Cf. San Diego County* v. *California Water & Telephone Co.*, 30 Cal.2d 817, 837, 186 P.2d 124, 133. The parties clearly know what acts are restrained, and the determinations made on their legal relations on these points. The injunctions meet the obligations of Rule 65.

The authorities cited by petitioner on the contention are inapposite, in no way suggesting any reason for

exercise of this Court's jurisdiction. There is no conflict with decisions of this Court or other courts of appeals, nor any question which should be settled here.

The cases cited by petitioner under I(b), as to the conflicts of decisions rule, have no application here because none of them dealt with a case, where, as here, it would be inequitable or unjust, because of a promise made by one party to the other, intending reliance thereon, and where the other party does rely thereon to his detriment, to permit repudiation. The cited cases involved suits for damages for breach of alleged contracts, or for specific performance of indefinite contracts, and did not, as here, involve estoppel.

The basis of the courts' opinions below was estoppel, which was in accordance with general law, and was supported by Oklahoma decisions, applied by judges long familiar with Oklahoma law; and therefore carrying special force. *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 281; *Hillsborough* v. *Township of Cromwell*, 326 U.S. 620, 630; *Steele* v. *General Mills*, 329 U.S. 433, 439; *Huddleston* v. *Dwyer*, 322 U.S. 232, 237. Conflict of decisions of courts of appeal as ground for granting certiorari, where federal law is not involved, afford no basis for review here since *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 and *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202.

As to federal law, there is no substance to the only point related to it, and no question calling for this Court's attention. No reason for review stated by Rule 19 of this Court is present, and no other appropriate basis for it is involved.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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